Filed 2/26/09 A.H. v. Super. Ct. CA2/1

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

A.H., SR.,

Petitioner,

v.

THE SUPERIOR COURT OF LOS ANGELES COUNTY,
Respondent;

LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES,
Real Party in Interest.

No. B213115

(Los Angeles County Super. Ct. No. J942532)

ORIGINAL PROCEEDING; Petition for extraordinary writ. Anthony Trendacosta, Juvenile Court Referee. Petition denied; motion to augment granted; motion to dismiss denied.

A.H., Sr., in pro. per, for Petitioner.

No appearance for Respondent.

Raymond G. Fortner, Jr., County Counsel, James M. Owens, Assistant County Counsel, and Timothy M. O'Crowley, Senior Deputy County Counsel, for Real Party in Interest.

Children's Law Center of Los Angeles and Edward Godinez Tsang for A.H.

A.H., Sr., (Father) appearing in propria persona, seeks an extraordinary writ to vacate the juvenile court's order denying him reunification services with his biological son, A.H., and setting a termination of parental rights hearing pursuant to Welfare and Institutions Code section 366.26.[1] The Los Angeles County Department of Children and Family Services (DCFS) has filed a motion to augment the record, a motion to dismiss the petition, and an answer to the petition. A.H. joins in the answer filed by DCFS. We grant the motion to augment, deny the motion to dismiss, and deny Father's petition.

BACKGROUND

Yolanda P. (Mother) is the mother of A.H. and O.H., fraternal twin boys born in December 2007.

A juvenile dependency petition filed in January 2008 alleged that Mother had placed A.H. and O.H. at serious risk for physical harm due to her drug abuse. The juvenile court sustained the petition; released the minors to Mother on the condition that she remain in her sober living program; declared Father the alleged father of the minors; ordered genetic testing to determine paternity of the minors; and granted Father monitored visitation rights.

In May 2008, based on genetic test results, the juvenile court declared Father the biological father of A.H., but not O.H.[2] The court ordered continued reunification services for Mother, but did not order reunification services for Father because of his status as an "alleged father."

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[1] All further statutory references are to the Welfare and Institutions Code. We refer to petitioner as A.H., Sr. in order to preserve the anonymity of the minor, A.H., who shares the same name.

[2] The identity of O.H.'s biological father remains unknown.

In June 2008, DCFS filed a supplemental petition pursuant to section 387, alleging that Mother had stabbed her former male companion, Johnny C., in the face and was arrested for the offense. On June 17, 2008, the juvenile court detained the minors and placed them in foster care. Father did not appear, despite notice given by the case social worker.

At the jurisdictional/dispositional hearing on October 22, 2008, where both Mother and Father appeared, the juvenile court admitted into evidence the jurisdiction/disposition report prepared by DCFS. The report contained the following findings: Mother has abused drugs, including crack cocaine, for over 20 years; she has a long history of arrests and incarcerations, most recently for stabbing her male companion, which resulted in a sentence of two and a half years in state prison; physicians have diagnosed Mother with manic depression and schizophrenic paranoia; Mother has seven to ten other children, all with different fathers, and most of whom have been dependents of the juvenile court at one point or another; Mother is not in a relationship with Father; Father made no contact with A.H. or O.H. during the reporting period.[3] The juvenile court assumed jurisdiction over the minors.

At the dispositional hearing on December 3, 2008, the juvenile court determined that it was in the minors' best interests to terminate reunification services for Mother pursuant to section 361.5, subdivisions (b)(5), (b)(10-11), and (b)(13).[4] Father did not appear at the dispositional hearing, despite notice by DCFS. Father's counsel maintained

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[3] During an interview, however, Mother stated that Father had "seen the babies and brought them some things" at one point.

[4] Section 361.5, subdivision (b) provides: "Reunification services need not be provided to a parent . . . when the court finds, by clear and convincing evidence, any of the following: . . . (5) That the child was brought within the jurisdiction of the court under subdivision (e) of Section 300 because of the conduct of that parent or guardian . . . (10) That the court ordered termination of reunification services for any siblings or half siblings of the child because the parent of guardian failed to reunify . . . (11) That the parental rights of a parent over any sibling or half sibling of the child had been permanently severed . . . [and] (13) That the parent or guardian of the child has a history of extensive, abusive, and chronic use of drugs . . . ."

that Father wanted custody of A.H. and requested reunification services. The juvenile court stated: "I know [Father] was, at one point, interested. But he's not here today. He is an alleged father. Therefore, the court is exercising its discretion not to provide reunification services to him." The court scheduled a permanency planning hearing pursuant to section 366.26 for April 1, 2009. On December 5, 2008, the court clerk sent Father a copy of the order setting the section 366.26 hearing. Father filed a notice of intent to challenge the order on December 19, 2008.

DISCUSSION

I. DCFS's Motions

Before turning to the merits of Father's petition, we turn first to DCFS's motion to augment the record and motion to dismiss the petition.

We grant the motion to augment the record with copies of the juvenile court's orders rendered on February 11, 2008, March 7, 2008, and May 13, 2008. (Cal. Rules of Court, rule 8.155.)[5]

We deny the motion to dismiss the appeal for the reasons discussed below.

Sufficiency of petition: A party seeking extraordinary writ relief is obliged to submit a petition that "substantively addresses the specific issues to be challenged and is supported by an adequate record." (*Glen C. v. Superior Court* (2000) 78 Cal.App.4th 570, 582.) As DCFS argues, Father's petition falls short of that requirement because it lacks a statement of facts, legal argument, and citations to the record and legal authorities. (See rule 8.452 [requirements for petition for extraordinary writ].) Despite its deficiencies, however, we shall entertain Father's petition on the merits. "The interest at stake in [such] petitions is of extreme importance, as the termination of reunification services in most instances ensures the subsequent termination of parental rights at the section 366.26 hearing." (*Glen C. v. Superior Court*, *supra*, 78 Cal.App.4th at p. 580.)

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[5] All subsequent rule references are to the California Rules of Court.

Timeliness: Because the clerk mailed Father notice of the orders terminating reunification services and setting the section 366.26 hearing on December 5, DCFS contends that the last day Father could challenge the court's order was December 17, and thus the notice of intent he filed on December 19 was untimely. DCFS cites to rule 5.600(c), which provides: "[A] notice of intent to file a writ petition . . . must be filed with the clerk of the juvenile court within 7 days of the date of the order setting a hearing under section 366.26. The period for filing a notice of intent to file a writ petition . . . will be extended 5 days if the party received notice of the order setting the hearing under section 366.26 only by mail."

DCFS fails to recognize that under rule 8.450(e)(1)(E), which also governs the timeliness of writs challenging orders setting section 366.26 hearings, "[i]f the order was made by a referee not acting as a temporary judge, the party has an additional 10 days to file the notice of intent . . . ." Here, the order was issued by a commissioner, who sat as a referee and not as a temporary judge. Thus Father had until December 27, 2008 to file his notice of intent.

II. Father's Petition

Father simply states in his petition that "I am petitioning the court decision to take permanent custody of my son [A.H.], Jr." He provides this court with no additional guidance as to what grounds, if any, support vacation of the order terminating reunification services and setting the section 366.26 hearing.

"Once the dependency statutes address the issue of possible termination of parental rights, they begin to differentiate between the rights of 'presumed,' 'natural,' and 'alleged' fathers."[6] (*In re Zacharia D.* (1993) 6 Cal.4th 435, 448.) Only a presumed father, and not a natural father, is entitled to placement or reunification services. (*Id*. at pp. 448-449, 451; see also *In re Sarah C.* (1992) 8 Cal.App.4th 964, 974 ["Nothing in

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6 A "biological or natural father is one whose biological paternity has been established, but who has not achieved presumed father status . . ." (*In re Zacharia D.*, *supra*, 6 Cal.4th at p. 449, fn. 15.)

juvenile dependency law states reunification services must be provided to a man solely based on his status as the biological father"].) "Due process for an alleged father requires only that the alleged father be given notice and 'an opportunity to appear and assert a position and attempt to change his paternity status. [Citations.]'" (*In re Paul H.* (2003) 111 Cal.App.4th 753, 760.)

In order to become the presumed father of a child, a man must fall within one of several categories enumerated in Family Code section 7611. These categories include, but are not limited to: marriage or attempted marriage to the child's mother before or after birth of the child; receiving the child into his home and openly holding out the child as his own; and consent to be named as the child's father on the child's birth certificate. (Fam. Code, § 7611.)

From January 2008, when DCFS filed the original dependency proceeding, to December 2008, when the juvenile court set the section 366.26 hearing, Father had ample opportunity to come forward to establish his presumed father status. Father, however, made no such attempt and was absent for many of the interim hearings, including the hearing setting the section 366.26 hearing. Moreover, according to the findings in the jurisdictional report, Mother had no relationship with Father and Father made no contact with A.H. during the reporting period. In short, Father failed to carry his burden of demonstrating that he qualifies as A.H.'s presumed father, and thus is not entitled to placement or reunification services. (*In re Spencer W.* (1996) 48 Cal.App.4th 1647, 1653 [alleged father has the burden to establish by a preponderance of the evidence that he qualifies as the presumed father].)

As an alleged father, Father only had the due process right to notice and the opportunity to appear and change his paternity status. There is no dispute that Father was provided with such notice and opportunity.

DISPOSITION

The petition for extraordinary writ is denied. The motion to augment the record is granted. The motion to dismiss is denied.

NOT TO BE PUBLISHED.

BAUER, J.*

We concur:

MALLANO, P.J.

ROTHSCHILD, J.

* Judge of the Orange County Superior Court assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.